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IN THE

Supreme Court of the United States

October Term, 1955

No. 232

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, *et al.*,

Appellants,

vs.

ROBERT M. DAWSON, JR., *et al.*,

Appellees.

R. BROOKE MAXWELL, etc., *et al.*,

Appellants,

vs.

MILTON LONESOME, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Fourth Circuit

MOTION TO DISMISS OR AFFIRM

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Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that these appeals be dismissed as improperly brought on the ground that the constitutionality of a "state statute" within the meaning of Title 28, United States Code, Section 1254(2) is not here in issue, and, in the alternative, move that the final judgment and decree of the Court of Appeals be affirmed on the ground that it is so clearly correct as not to warrant further argument.

Statement

These are two appeals, consolidated in the court below and here, from a final judgment and decree entered by the Court of Appeals on March 14, 1955, reversing the judgment of the District Court which had refused to grant injunctive relief against the enforcement of racial segregation in public beaches at Sandy Point State Park and at Fort Smallwood Park. The basis for the District Court's decision (123 F. Supp. 193) was that *Brown* v. *Board of Education*, 347 U. S. 483, and *Bolling* v. *Sharpe*, 347 U. S. 497, did not apply and that the "separate but equal" doctrine remained the appropriate constitutional yardstick in the field of public recreation here involved. The Court of Appeals (220 F. 2d 386) reached a contrary conclusion on the ground that rationale governing disposition of these cases was to be found in *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; *Henderson* v. *United States*, 339 U. S. 816; *Brown* v. *Board of Education, supra;* and *Bolling* v. *Sharpe, supra*, and not in *Plessy* v. *Ferguson*, 163 U. S. 537, and that racial segregation could no longer be justified on a mere showing that the tangible facilities furnished one race was equal to those furnished the other. Appellants brought the cases here. Appellees were granted leave to file their motion to dismiss or affirm on or before September 30, 1955.

Argument

1. While appellees would prefer that these appeals be disposed of on their merits, it must be pointed out that appellants' right to appeal to this Court is beclouded with doubt. If appellants have chosen the improper procedure to seek review in this Court, their appeals must be dismissed without more. Appellants urge that the Court treat their appeals as petitions for writs of certiorari in the event

that an appeal will not lie. As petitioners for writs of certiorari, however, they were filed untimely, and in view of appellants non-compliance with Title 28, United States Code, Section 2101(c), this Court has no jurisdiction to treat these appeals as petitions for writs of certiorari. They must stand or fall on whether the jurisdictional prerequisites under 1254(2) have been met.

Appellants claim that they may appeal as of right in these cases and that the Supreme Court is vested with jurisdiction by virtue of Title 28, United States Code, Section 1254(2) which provides that:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: . . . (2) By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . .

Appellants, however, have produced no authority for the proposition that the informal rules requiring segregation, maintained and enforced by appellants, the Commission of Forests and Parks and the Board of Recreation and Parks, or the regulations and practices of the Board of Recreation and Parks of the City of Baltimore are "state statutes" within the meaning of Section 1254(2). None of the cases which they cite reach appellants' situation. *McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 176; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262; *New York* v. *Latrobe*, 279 U. S. 421; *Republic Pictures Corp.* v. *Kappler*, 151 F. 2d 543 (CA 8th 1945), aff'd, 327 U. S. 757, rehearing denied, 327 U. S. 817; *Public National Bank of New York* v. *Keating*, 47 F. 2d 561 (CA 2nd 1931), aff'd, 284 U. S. 587, concerned challenges to the constitutionality of statutes enacted by state legislatures. *City of Richmond* v. *Deans*, 37 F. 2d 713 (CA 4th 1930), aff'd, 281 U. S. 704, involved a zoning ordinance enacted by a municipality.

It must be admitted, however, that appellees have found no authority which affirmatively forecloses the question against appellants' jurisdictional claim. Relatively few cases have reached this Court on appeal from the Courts of Appeals since Section 1254(2) was enacted in its present form in 1925, and none have necessitated an examination of the meaning of "state statute."

An examination of the House and Senate reports and the Congressional debates on the bill does not illuminate the issue. The bill as originally presented and reported would have abolished all appeals from Courts of Appeals to the Supreme Court, leaving certiorari as the only route available to a defeated party. A number of Senators, alarmed at the possibility that the Courts of Appeals might become the final arbiters in cases involving the constitutionality of state statutes, offered an amendment vesting appellate jurisdiction in the Supreme Court in cases where the Courts of Appeals held state statutes unconstitutional, and thus Section 1254(2) was enacted in its present form. 66 Cong. Rec. 2876-2880, 2916-2929 (1925). See also Frankfurter and Landis. *The Business of the Supreme Court* 276-278 (1927). No legislator, however, attempted to give content to the word "statute."

Moore, in his *Commentary on the U. S. Judicial Code* (1949) at page 552, suggests that "statute" under Section 1254(2) be given the same meaning as "statute of any state" in Section 1257(2)—the section giving the Supreme Court appellate jurisdiction over certain cases decided by the highest courts of the state. Counsel was unable to find any legislative history or decisional law to support Moore's thesis that this is the proper construction of Section 1254(2). Needless to say, acceptance of this contention would greatly aid appellants in their effort to sustain their position that direct appeal is procedurally proper in these cases.

The rule governing Section 1257(2) was first stated in *William* v. *Bruffy,* 96 U. S. 176, where the Court said at p. 183:

> Any enactment from whatever source originating to which a state gives the force of law is a statute of the state, within the meaning of the clause cited relating to the jurisdiction of this court.

Although the statute has been materially changed since the advent of the *Bruffy* case, this Court has adhered to the rule there stated. Thus, this Court has sustained its appellate jurisdiction in cases involving challenges to municipal ordinances, *King Manufacturing Co.* v. *Augusta,* 277 U. S. 100; and to the orders of state agencies and commissions. *Sultan Ry. & T. Co.* v. *Department of Labor & Industries,* 277 U. S. 135; *Hamilton* v. *University of California,* 293 U. S. 245. These decisions and others, see, *e. g., People ex rel. McCollum* v. *Board of Education,* 333 U. S. 203; *Atchison Topeka and Santa Fe Ry. Co.* v. *Public Utilities Commission,* 346 U. S. 346, might be distinguished on the ground that, in each case, the agency's order was clearly authorized by a state statute.

It must be conceded, however, that it would be more difficult to distinguish the rationale. In the *McCollum* and *Atchison* cases, the Court held that the fact that the highest court of the state had sustained the agency action, as authorized by state law, was sufficient to show that the validity of a "statute" was drawn into question. Here, as appellants have noted, the highest court of Maryland has held that appellants' policy of segregation is authorized by state law. *Durkee* v. *Murphy,* 181 Md. 259, 39 Atl. 2d 253 (1942).

Nevertheless, as noted previously, there is no decisional or legislative authority, we know of, to warrant a conclusion that those cases giving force and meaning to Section

1257(2) control the construction of the scope and meaning of 1254(2). In fact, in *King Manufacturing Co.* v. *Augusta, supra,* the leading modern case interpreting the meaning of "statute" under Section 1257(2), this Court specifically stated that its decision was limited to cases coming from state courts and should not be construed as an interpretation of other jurisdictional provisions. Indeed, logic would seem to favor giving "state statute" as used in Section 1254(2) a strict and technical construction, since an appeal to this Court as a matter of right is allowable only in an extraordinary class of cases.

It may well be that this Court should now clarify this somewhat obscure procedural question, but, we submit, appellants have chosen to pursue a hazardous procedural course and subject their appeals to dismissal on jurisdictional grounds.

2. The logic of the decision of the Court of Appeals is, inescapable, we submit. Here appellees sought unrestricted use of public beaches and parks operated by the State of Maryland and the city of Baltimore on the grounds that the enforced racial segregation was unconstitutional in the light of the rejection of the "separate but equal" doctrine by this Court in the *School Segregation Cases.* While it is true that *Brown* v. *Board of Education* and *Bolling* v. *Sharpe,* involve public education at the elementary and secondary school levels, the rationale of those cases is applicable here and must govern disposition of this controversy. It could hardly be held under the facts of these cases that racial segregation constitutes a denial of "equal protection of the laws" and "due process of law" when practiced in public schools, and is consistent with those constitutional concepts in the field of public recreation. The judgment of the Court of Appeals is clearly correct and should be affirmed.

CONCLUSION

Wherefore, for the reason hereinabove stated, it is respectfully submitted that these appeals should be dismissed and/or that the judgment appealed from should be affirmed.

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